99TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
99-761

AMENDING THE INDIAN SELF-DETERMINATION ACT OF 1974, AND FOR OTHER PURPOSES

AUGUST 7, 1986.—Committed to the Committee on the Whole House on the State of the Union and ordered to be printed

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Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

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REPORT

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[To accompany H.R. 4174]

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DEPOSITORY 37[illegible]

(Including cost estimate of the Congressional Budget Office.)

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 4174) to amend the Indian Self-Determination Act of 1974, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

That this act may be cited as the "Indian Self-Determination Amendments of 1986."

SEC. 2. (a) The Congress finds that:

(1) the Indian Self-Determination and Education Assistance Act of 1975, P.L. 93-638, 25 U.S.C. §§ 450, et. seq., (the "Act") has furthered the development of local self-government and education opportunities for Indian tribes but its goals and progress have been impeded by lack of clarity and direction on the part of Federal agencies regarding their roles in implementing the Federal policy of Indian self-determination;

(2) the Federal responsibility for welfare of Indian tribes demands effective self-government by Indian tribal communities; and

(3) additional legislation is necessary to assure that Indian tribes have an effective voice in the planning and implementation of programs for the benefit of Indians.

SEC. 3. Section 4 of the Act is amended as follows:

(1) In subsection (b), after the words "village corporation" add "or regional association".

(2) At the end of subsection (c), place the semi-colon by a colon and add the following:

"Provided, That in areas where the Indian Health Service has not direct care facilities and the tribes are served by a tribal organization, such tribal organization

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shall be eligible to receive a contract under the authority of this Act if it has the approval of each tribe it proposes to serve."

(3) Redesignated subsection (f) as subsection (e) and all the following new subsection:

"(f) 'Construction' means the planning, design, construction, repair, improvement, and expansion of buildings or facilities including, but not limited to, housing, sanitation, roads, schools, administration and health facilities, irrigation and agricultural works and water conservation, flood control, or port facilities.".

(4) Add the following new subsection (g):

"(g) 'Contract Support Costs' means reasonable costs for activities which must be carried on by a tribal organization as a contractor under the Act to ensure compliance with the terms of the contract and purdent management but which (i) normally are not carried on by the respective Secretary in his direct operation of the program or (ii) are provided by the Secretary in support of the contracted program from resources other than those under contract.".

SEC. 4. Subsection (a) of section 102 is amended by inserting the words "including construction programs" after the words "administer programs" and by inserting after the words "subsequent thereto" the following:

"including (i) any program or portion thereof, including construction program, administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of the Interior, and (ii) any program, or portion thereof, for the benefit of Indians without regard to the agency or office of the Department of the Interior within which it is performed;".

SEC. 5. (a) Subsection (a) of section 103 of the Act is amended by inserting after the words "as amended" a comma and the following:

"or any program, or portion thereof, which the Secretary is authorized to administer for the benefit of Indians including (i) any such program, or portion thereof for which appropriations are made to agencies other then the Department of Health and Human Services and (ii) any such program, or portion thereof, without regard to the agency, or office within which it is performed within the Department of Health and Human Services".

(b) Subsection (c) of section 103 of the Act is amended to read as follows:

"(c) Notwithstanding the provisions of section 2671, title 28, any tribal organization which has entered into a contract grant or cooperative agreement with the Secretary of Health and Human Services shall be treated as an agency within the Department of Health and Human Services for purposes of the Federal Torts Claim Act with respect to any tort arising out of its performance of such contract, grant or cooperative agreement. For purposes of this subsection and the Federal Tort Claims Act, the Secretary of Health and Human Services is designated as the head of the agency within the meaning of section 2672, title 28.".

SEC. 6. Subsection (e) of section 105 of the Act is amended by deleting the words "on or before December 31, 1985".

SEC. 7. (a) Subsection (a) of section 106 of the Act is amended by changing the period at the end thereof to a colon and adding the following:

"*Provided further,* That any request by an Indian tribe or tribal organization for a waiver of such laws or regulations or other regulations of the appropriate Secretary shall be granted unless declined in accordance with the criteria provided in section 102 or 103 of this Act and under the procedures established by regulations for the declination of tribal requests under such sections."

(b) Subsection (e) of section 106 of the Act is further amended by changing the period at the end of the sentence to a colon and inserting in lieu the following: "*Provided,* That at his discretion, the appropriate Secretary may transfer the title to the Indian tribes to any personal property found to be in excess to the need of the Bureau of Indian Affairs or Indian Health Service.".

SEC. 8. Section 106 of the Act is amended by changing subsection (h) to read as follows:

"(h)(1) The amount of funds provided under the terms of contracts entered pursuant to this Act shall be no less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portion thereof for the period covered by the contract: *Provided,* That—

"(i) for other than school or education programs, to such amount shall be added contract support costs which shall be negotiated with each contractor annually and which shall include costs attributable to all non-school or non-education programs for which the tribal organization has contracted pursuant to section 102 and 103 of this Act, and

"(ii) for school and education programs, the Secretary of the Interior shall adopt regulations establishing a formula for determining the amount of administrative overhead costs necessary to sustain the administration of such programs. This formula shall among others, include such factors as school enrollment, education program scope, organizational and administrative plans, support services plan, size of facilities, size or area within the school's service area boundaries, isolation, unique regional costs, presence of non-educational programs, personnel training plan, and the allowable indirect costs standards. Funds for administrative overhead costs allocated by this formula shall be promptly added to each contract.

"(2) Once contract obligations are negotiated, the contract amount may be increased or decreased only with the consent of the contractor to reflect an increase or decrease in the level of appropriations.

"(3) Any savings in operation or administration of such contract shall be utilized to provide additional services or benefits under the contract and may be carried over to the succeeding fiscal year without any reduction in the funding to which the contractor is otherwise entitled. Grounds for declining to carry over such saving shall be limited to those grounds specified in sections 102 and 103 of the Act.

"(4) At the request of any Indian tribe, the appropriate Secretary shall disclose the most current amount of funding planned, obligated and expended for any program, or portion thereof, administered for the benefit of such tribe down to the fourth level of each agency's accounting system.

"(5) The appropriate Secretary shall include in annual budget requests to the Congress a request for the funds necessary to provide contract support costs for all contracts anticipated in the fiscal period covered by the request and shall provide a supplemental report to the Congress on or before June 15th of each year identifying any deficiency of funds requested below estimated needs.".

SEC. 9. Section 106 of the Act is further amended by adding the following new subsection (i):

"(i) The appropriate Secretary shall insure the responsive and efficient consideration of tribal requests under section 102, 103 and 104 of the Act by designating an official within the Bureau of Indian Affairs on the Indian Health Service, as appropriate, to supervise the review of applications and the negotiation, award and monitoring of contracts, grants or cooperative agreements by the appropriate agency. These two officials shall be charged with the duty to further the purposes of this Act. The appropriate Secretary shall also delegate to such official the authority to review, at the request of the contractors, decisions to decline such contract, grant or cooperative agreement applications subject to the right of any applicant to an appeal and hearing as provided in this Act.".

SEC. 10. Title 1 of the Act is amended by adding a new section 111 as follows:

"SEC. 111. (a) The appropriate Secretary shall designate officials who are not employed by the Bureau of Indian Affairs or the Indian Health Service for the purpose of conducting hearings in declination appeals.

"(b) Appeals and hearings on any declination to contract based on insufficient funding shall be conducted under the same procedures as apply in the case of other declinations.

"(c) The appropriate agency shall give notice of any disallowance of costs within 365 days of receiving any required audit report and shall provide for an appeal and hearing to the appropriate officials on any such disallowance. Any right of action or other remedy relating to any such disallowance shall be barred unless notice has been given within the designated period.".

SEC. 11. Title 1 of this Act is further amended by adding a new section 112 as follows:

"SEC. 112. All contracts, grants and cooperative agreements entered into or issued pursuant to this Act shall be subject to the Contract Dispute Act of 1978, P.L. 95–563.".

SEC. 12. Title 1 of the Act is further amended by adding a new section 113 as follows:

"SEC. 113. Whenever an indirect cost rate is negotiated annually between a tribe or tribal organization and the cognizant federal agency, that rate shall be applicable to all contracts and grants made with such tribe or tribal organization pursuant to section 102, 103 and 104 of this Act. If not otherwise specifically prohibited by any other provisions of law, such rate shall be applicable to any other federal program administered by such tribe or tribal organization, and each federal agency responsible for such program shall apply such negotiated indirect cost rate and pay the full indirect costs incurred by the tribe or tribal organization in connection with the administration of such program. Whenever, in any fisal year, a tribe or tribal organi-

zation does not receive full payment of its indirect costs from any federal, state or other entity funding a program, such lack of full payment shall not be considered in determining the Federal indirect cost rate for the subsequent fiscal years.".

SEC. 13. Section 8 of the Act is amended by adding after the period, the following sentence:

"In the event such funds are obligated but not expended during such succeeding fiscal year they may be expended during the next succeeding fiscal year. If the funds are to be expended in the succeeding fiscal years for the purpose for which they were originally appropriated, contracted or granted, no additional justification or documentation of such purposes need be provided by the tribal organization to the agency as a condition of receiving and expending such funds. At least 80% of such funds, as determined by the agency and the contractor or grantee, shall be made available on the first day of the succeeding fiscal year.".

PURPOSE

The purpose of H.R. 4174 is to amend the Indian Self-Determination Act of 1974, P.L. 93–638 to facilitate the contracting process for Indian tribes and to further the objective of achieving self-determination for Indian tribes.

BACKGROUND

In 1975, Congress passed the Indian Self-Determination Act, P.L. 93–638. The purpose of the Act was to promote tribal self-government. To accomplish this it encouraged tribes to contract for the administration of programs previously administered by the Indian Health Service (IHS) and the Bureau of Indian Affairs (BIA). Such contracts ranged from the administration of a tribal police department to the administration of a tribal hospital.

Since the Act was passed, tribes have encountered many problems in their contracts with the Federal agencies. Generally, tribes have complained that, because Federal contracting requirements and bureaucratic regulations are too rigid and burdensome, they have not been able to implement their own priorities and agenda for tribal self-determination.

Many tribes feel that they are paying a financial penalty for the right to contract for the administration of a Federal program. Many costs associated with the performance of the contracts are not funded by the Federal government and therefore have to be covered by the tribes at their own expenses. The Act provides that:

> The amount of funds provided under the terms of contracts * * * shall be no less than the appropriate Secretary would have otherwise provided for his direct operation of the program(s) * * * covered by the contract * * *

Many costs incurred by the tribes would not have been incurred by the "appropriate Secretary" such as costs associated with audits, insurance, legal, and accounting fees. Other costs are incurred by the Federal government but are funded by other programs or agencies and are unrelated to the program being contracted. Therefore, such costs are not included in the amount of funds being contracted by the tribes.

In order the help the tribes cover such costs, the BIA previously used a special line item in its Congressional Budget Requests called "Contract Support Funds." However, at the request of the Appropriations Committees, funds in this line item were merged with other program funds. In 1985, the BIA decided that instead of funding such costs separately, it would, from then on, grandfather such

costs on a one time basis in one lump sum in existing contracts at 100% of the level of need. That level was determined based on what the need was for fiscal year 1984.

Unfortunately, the BIA never requested and never received enough funds to cover such contracts at the 100% need level. As a result, the tribes have had to fund some of these extra contract costs from their own tribal funds. Since many tribes do not have such extra funds, they are threatening to retrocede their contracts to the Federal agencies. A mass termination of such contracts would amount to a failure in the implementation of the policy of self-determination for Indian tribes.

H.R. 4174 attempts to remedy such problems by amending the Self-Determination Acts so as to guarantee the tribes an adequate level of funding for contract support costs. The bill also amends the Act so as to give the tribes a stronger voice in determining policies affecting the various federal programs being contracted.

SECTION-BY-SECTION ANALYSIS

SECTION 1

This section cites this Act as the "Indian Self-Determination Amendments of 1986."

SECTION 2

This section provides for the Congressional findings to the effect that Indian tribes should be given more of a voice in the implementation of the Federal policy of Indian Self-Determination.

SECTION 3

This section defines certain terms for the purposes of the Act. Paragraph (1) amends the definition of "Indian Tribes" so as to include Alaskan Regional Associations under the definition. It is the intent of the Committee that such regional non-profit associations and the Regional Corporations shall be treated equally by the Federal agencies in their determinations to decide which entities shall be awarded contracts under the Act. If a regional corporation and a regional association request that a contract, grant agreement of cooperative agreement be entered into with different tribal organizations for the same program of portion thereof, the appropriate Secretary shall determine which tribal organization shall be awarded the contract based on which organization is best qualified and will better perform the tasks required by the contract. In making such a determination, the Secretary shall take into account the capabilities of the organizations and the wish of the majority of the native population served by the contract.

Paragraph (2) adds a proviso at the end of the definition of "tribal Organization." The proviso is intended to allow a tribal organization servicing a defined area to be issued a self-determination contract even if it does not have the consent of all of the tribes in the area. Under the proviso, the contract would only be issued to serve the tribes which have given their consent and the Agency would be required to provide services to the non-consenting tribes by issuing a contract under the Buy-Indian Act or otherwise.

Paragraph (3) defines the term "construction" for purposes of the Act.

Paragraph (4) defines the term "Contract Support Costs" for the purposes of the Act.

SECTION 4

This section amends section 102 of the Act by clarifying that construction programs are indeed contractible under P.L. 93–638. In addition, the section provides that all programs administered by the Secretary of the Interior for the benefit of Indians can be contracted by Indian tribes including those for which appropriations are made initially to agencies not within the Department of the Interior. This section also specifies that such programs are contractible regardless of what agency (i.e., BIA or BLM) administers the program within the Department and regardless of which office or level within such agency (i.e., B.I.A. Area or Agency level) administers such programs.

SECTION 5

Subsection (a) of this section amends section 103 of the Act in the same manner that section 4 amends section 102 of the Act.

Subsection (b) amends subsection 103(c) by providing that a tribe or tribal organization which has entered into a grant or contract with the Secretary of Health and Human Services (H.H.S.) under Public Law 93–638 shall be treated as an agency within H.H.S. for the purposes of the Federal Tort Claim Act. This amendment is intended to address the problem which tribes have had in acquiring malpractice insurance in connection with the performance of such contracts. Under this amendment, it is the United States which will be the insurer against such claims.

It is the Committee's intent that, although the tribe shall be considered an agency of the Federal Government under the Federal Tort Claims Act, the Secretary of H.H.S. and not the tribal chairman shall be considered the head of such agency for the purpose of the Federal Torts Claims Act. It is therefore the Secretary who shall be vested with any duty to either negotiate, settle or defend the interest of the agency and the United States in any lawsuit filed against the tribal contractor.

SECTION 6

This section amends subsection 105(e) of the Act. Under such section, Federal employees leaving Federal employment to join a tribal organization which had obtained a contract under the Act could still elect to retain some of their Federal employment benefits provided such transfer to tribal employment occurred by December 31, 1985. The amendment extends such deadline indefinitely.

SECTION 7

Subsection (a) amends subsection 106(a) of the Act and provides that upon the request of a tribal contractor, federal contracting laws and regulations shall be waived unless declined in accordance

with the criteria provided in sections 102 and 103 of the Act. Therefore such requests shall be granted unless the Secretary finds that such waiver of contracting laws and regulations: (1) will result in unsatisfactory service under the contract or (2) will not assure adequate protection of the trust or (3) will undermine the proper completion or maintenance of the program served by the proposed contract.

Subsection (b) amends subsection 106(e) so as to authorize the Secretary of the Interior, at his discretion, to transfer title of excess federal personal property to the Indian tribes.

SECTION 8

This section amends subsection 106(h) of the Act by striking the previous language and providing the following:

Paragraph (1) of subsection 106(h) provides that funding under a contract shall be no less than the Secretary would have otherwise provided for his direct operation of the program. In addition, subparagraph (i) provides that, except for school or education programs, such funds shall be added to contract support costs. These costs shall be negotiated on an annual basis. It is not the intent of the Committee by this subsection to prevent the tribes and the Federal agencies from negotiating an indirect cost rate for the administration of these contracts and programs. Instead, the section is intended to supplement whatever costs were previously included in the rate by adding costs which are necessary for the implementation of the programs or contracts, but which would not have been incurred by the Secretary had he administered them directly.

Subparagraph (ii) provides that in the case of school and education programs, the Secretary shall establish a formula for determining the administrative overhead costs necessary to sustain the administration of such programs. Funds for such administrative overhead costs allocated by this formula shall be added to each contract. It is the intent of the Committee that the Secretary, in determining such formula, shall take into account costs described in the definition of the term "contract support costs" under this Act and that such costs will be included as part of the administrative overhead costs added to such school or education contracts.

Paragraph (2) provides that once a contract is negotiated, the amount of funds provided in the contract can only be changed with the consent of the contractor or in order to reflect an increase or decrease in the level of appropriations. It is the intent of the Committee that unspecified or general reductions in funding levels mandated by Congress shall be equitably distributed between contractors or grantees and the federal agency involved.

Paragraph (3) provides that any savings in operation of such contract shall be used to provide additional services under the contract and may be carried over to the succeeding fiscal year. Funds carried over shall not be used to reduce the amount of funds to which such contractor would have been entitled in the next fiscal year had there not been any funds carried over from such contract. This paragraph also provides that the Secretary shall not allow the contractor to carry over such funds if such action violates the declination criteria contained in sections 102 and 103 of the Act.

Paragraph (4) provides that at the request of any Indian tribe, the appropriate Secretary shall disclose the most current amount of funding available, obligated or expended, for the benefit of such tribe down to the fourth level of each agency's accounting system. In the case of the B.I.A., the first level consists of "programs" (i.e. Operation of Indian programs), the second level consists of "activities" (i.e. Indian Services), the third level consists of "sub-activities" (i.e. tribal government Services) and the fourth level consists of "program elements" (i.e. Tribal Courts program).

Paragraph (5) provides that the appropriate Secretary shall include in budget requests to the Congress, a request for the funds necessary to provide contract support costs for all contracts anticipated in the fiscal year covered by the request. In addition, the Secretary shall provide a supplemental report to the Congress on or before June 15th of each year, identifying any shortage in the funding needed to provide such contract support costs.

SECTION 9

This section amends section 106 of the Act by adding a new subsection (i). This new subsection provides for the Secretary of the Interior and the Secretary of H.H.S. to each designate one official within their respective Department to supervise the negotiation, award and monitoring of contacts and grants under the Act. The appropriate Secretary shall also delegate to such official the authority to review decisions to decline such contract. The decisions of such official shall be subject to review by the Secertary.

SECTION 10

This section adds a new section 111 to the Act. Subsection (a) of the new section provides that the appropriate Secretary shall designate officials who are not employed by the B.I.A. or the I.H.S. for the purpose of conducting hearings in declination appeals under the Act. The Committee has found that in some cases, the officials conducting the appeals were not sufficiently independent from the officials who made the decisions being appealed. In order for these appeals to be meaningful, the officials conducting such appeals must be impartial. The bill's language is aimed at providing such impartiality.

Subsection (b) provides that hearings on any declination to contract based on insufficient funding shall be conducted under the same procedures as apply in the case of other declinations. This section is necessary because the Indian Health Service, unlike the Bureau of Indian Affairs, has refused the permit an appeal and hearing on the issue of the amount of funding to which a tribe is entitled under section 106(h) of the Act. IHS maintains that this is a "threshold issue", that the tribe must accept the unilateral determination of the IHS Area Office as to funds available and that the IHS Declination Appeals Board has no jurisdiction to hear tribal arguments about funding level. The Committee also received information that in some cases BIA officials have informally threatened tribes that funding for a program will be reduced if the tribe insists on contracting it. Such incidents underscore the importance of requiring an appeal and hearing on the important factual issue of

the level of funding to which a tribe is entitled under contracts pursuant to the Act.

This subsection would not limit the agencies' authority to determine how to allocate funds. It would simply provide tribal contractors with an opportunity for a hearing to determine whether the agency has complied with section 106(h) and has not unfairly discriminated against contracted programs in violation of that section.

Subsection (c) provides that the appropriate agency shall give notice to a tribal contractor within 365 days of receiving audit reports indicating that certain costs under a contract issued under this Act would be disallowed. If such notice is not given to the tribal contractor within these 365 days, the agency will lose its right to recover such costs from the contractor.

SECTION 11

This section adds a new section 112 to the Act which provides that all contracts, grants and cooperative agreements entered into pursuant to this Act shall be subject to the Contract Dispute Act of 1978, Public Law 95–563.

SECTION 12

This section provides that when an indirect cost rate is negotiated for a specific fiscal year between a tribe or a tribal organization and the cognizant federal agency, that rate shall be applicable to all contracts and grants made between the Federal government and this tribe or tribal organization pursuant to this Act. If not otherwise prohibited by a specific provision of law, that rate shall also be applicable to all federal contracts or grants made with this tribe or tribal organization. Each federal agency shall therefore provide the funds necessary to cover such indirect costs incurred by the tribal contractor or grantee in connection with the administration of such program.

Under this section, if not already done, each tribe or tribal organization will be assigned one cognizant federal agency by the Office of Management and Budget (O.M.B.). The Committee expects the O.M.B. to determine which agency shall be designated as the cognizant federal agency for each tribe or tribal organization depending on which federal agency is the agency with the predominant interest in the work of such tribe or tribal organization. The Committee expects that for most if not all tribal contractors or grantees, the O.M.B. will designate either the Bureau of Indian Affairs or the Indian Health Service as the "cognizant federal agency."

This section also provides that whenever, in any fiscal year, a tribe or tribal organization does not receive full payment of its indirect costs, such lack of full payment shall not be considered or used to lower the Federal indirect cost rate for the subsequent fiscal years.

SECTION 13

This section provides that certain unexpended funds will be available during the succeeding fiscal years and that if such funds are to be expended for the same purpose for which they were orgin-

ally appropriated, contracted or granted, the tribal contractors or grantees shall not need to provide additional documentation as a condition of receiving such previously appropriated funds from the agency.

COMMITTEE AMENDMENT AND EXPLANATION

The Committee adopted an amendment in the nature of a substitute which consists of a technical rewrite of the bill, would make some changes to the bill recommended by the various witnesses including the Department of the Interior, and would revise the definition of Indian tribes for the purpose of defining what is an Indian tribe in the State of Alaska.

Generally, the Committee amendment attempts to further develop the concepts contained in H.R. 4174 as introduced. The intent of the Committee in amending the Indian Self-Determination Act of 1975 is to facilitate the contracting process which the tribes have to undergo in order to achieve self-determination. It seems that since its inception, instead of focusing on self-determination, the agencies have only focused on developing complex contracting and program regulations. In this maze of rules and regulations, the original intent of the Self-Determination Act has somehow gotten lost.

The Committee found that numerous tribal contractors are subjected to unreasonably burdensome financial and programmatic reporting requirements. These requirements also seem to differ widely from region to region and from area to area. The Committee therefore expects the Secretary of the Interior and the Secretary of H.H.S. to develop reasonable and uniform reporting requirements which will not hamper the goals of self-determination. The agencies should also avoid excessive paperwork that interferes with the contractor's main mission, which is to provide service to Indians and Alaska Natives.

When Congress in the 1975 law, provided that self-determination should be achieved by using "contracts" with Indian tribes, it was not the intent to focus on transforming tribes into regular government contractors. Instead the use of "contracts" was provided to underline the fact that the programs which were being contracted were an obligation of the Federal trustee.

In 1974 Congress could have and, in retrospect, perhaps should have used some "instrument" other than "contracts" so as to steer the agencies' focus away from the contracting aspect of the law and focus their attention on the Self-Determination part of it. Therefore the Committee hopes that in the future, the agencies in implementing the Self-Determination Act will not treat the Indian tribes as regular government contractors but as self-governing entities with attributes of sovereignty.

During its review of the legislation, the Committee found that although the federal agencies impose many of the same contracting laws and regulations on tribal contractors as it does on federal contractors, generally, it does not always accord tribal contractors the same rights and privileges that other federal contractors receive. In fact, more burdensome requirements are imposed on tribal contractors than on federal contractors generally. Currently, for example, the Indian Health Service requires federal approval of practically

every subcontract, purchase of goods, or contract for consulting services that is proposed by a tribal contractor. Examples of this burden include: (1) required federal approval for purchase of any goods in excess of $300, unless the agency has reviewed and approved the contractor's purchasing policies, then the limit is $1,000 and (2) required IHS approval of leases and the purchase of insurance. These requirements call for excessive paperwork, cause delay, and in some cases prevent small contractors from making necessary purchases.

The Committee feels very strongly that the Indian Health Service and the Bureau of Indian Affairs should review their policies regarding federal approval of subcontracts, leases, and purchases of goods and services, including insurance and consulting services and should eliminate unnecessary and burdensome approval requirements. Special attention should be given to eliminating unreasonably low ceilings on purchases and subcontracts that contractors can execute without federal approval.

Cost and Budget Act Compliance

The cost analysis provided by the Congressional Budget Office is set forth below:

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 6, 1986.

Hon. Morris K. Udall,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, DC.

Dear Mr. Chairman: CBO has reviewed H.R. 4174. the Indian Self-Determination Amendments of 1986, as ordered reported by the House Committee on Interior and Insular Affairs on July 30, 1986. The effect of this bill on the budget of the federal government is probably to increase costs, but it is impossible to estimate the magnitude of this increase. Any increase would be subject to additional appropriations action. CBO expects that the budgets of state and local governments would not be affected by enactment of this legislation.

H.R. 4174 would make several changes to the Indian Self-Determination and Education Assistance Act of 1975, which allowed tribes to contract to administer Indian programs previously run by the federal government. Section 5(b) of the bill would allow tribal organizations having contracts with the Secretary of Health and Human Services (HHS) to be covered by the Federal Tort Claims Act. The Federal Tort Claims Act protects medical professionals employed by the federal government by providing that only the federal government can be sued for damages resulting from the performance of a federal employees' duties. Under current law, medical professionals employed by tribes that contract for the administration of Indian health programs are not covered by the Act, requiring tribal organizations to carry medical malpractice insurance. This provision would make filing suit against the federal government the exclusive remedy, eliminating a tribe's need for malpractice insurance.

This provision would increase the federal government's liability. However, CBO has no basis to estimate the additional liability that would be taken on by the federal government or the additional cost that could be incurred by the Justice Department for defending more liability cases. This provision could also reduce federal costs to the extent that tribal malpractice insurance is currently paid for by the federal government as an indirect cost component of administrative contract agreements. The federal share of tribal insurance costs is unknown.

Section 8 of the bill would clarify congressional intent that contract support costs, or indirect costs, should be provided to tribes under administrative contract agreements. This section would also require the Secretary of HHS and the Secretary of the Interior to request separately funds for contract support costs. CBO expects that this provision would result in no additional cost to the federal government. Section 8 provides no new authority to agencies. Under current law and through regulations, both the Indian Health Service and Bureau of Indian Affairs already have the authority to fund direct and indirect costs incurred by tribes. There is no maximum to the amount that can be provided to tribes under contract.

Section 12 of the bill would require all federal agencies to use the same indirect cost rate, negotiated annually between tribes and the federal government, for all contracts and grants made with tribes. Currently, indirect costs are negotiated for each contract. The use of an annually negotiated rate could result in a change in federal expenditures for indirect contract costs. Any change would be determined by the rate agreed to and how it compares to the rates currently paid by the federal government.

CBO expects that all other sections of the bill would result in no significant additional cost to the federal government.

Please call me or have your staff contact Carmela Dyer (226–2820) if you have further questions.

With best wishes,

Sincerely,

RUDOLPH G. PENNER.

INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 4174 will have no significant inflationary impact.

OVERSIGHT STATEMENT

While review of the legislation involved passed activities and problems, no specific oversight activities were undertaken by the Committee and no recommendations were submitted to the Committee pursuant to rule X, clause 2(b)2.

COMMITTEE RECOMMENDATION

Committee on Interior and Insular Affairs, by voice vote, ordered H.R. 4174, as amended, favorably reported and recommends its enactment by the House.

CHANGES IN EXISTING LAW

In compliance with paragraph 2 of clause 3 of rules XIII of the House of Representatives, changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

(88 Stat. 2204; 25 U.S.C. 450 et seq.)

* * * * * * *

SEC. 4. DEFINITIONS.—For the purpose of this Act, the term—

(a) "Indian" means a person who is a member of an Indian tribe;

(b) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native Village or regional or village corporation *or regional association* as defined pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(c) "Tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or [grant;] *grant: Provided, That in areas where the Indian Health Service has no direct care facilities and the tribes are served by a tribal organization, such tribal organization shall be eligible to receive a contract under the authority of this Act if it has the approval of each tribe it proposes to serve.*

(d) "Secretary", unles otherwise designated, means the Secretary of the Interior;

[(f)] *(e)* "State education agency" means the State board of education or other agency or officer primarily responsible for supervision by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(f) "Construction" means the planning, design, construction, repair, improvement, and expansion of buildings or facilities including, but not limited to, housing, sanitation, roads, schools, administration and health facilities, irrigation and agricultural works and water conservation, flood control, or port facilities.

(g) "Contract Support Costs" means reasonable costs for activities which must be carried on by a tribal organization as a contractor under the Act to ensure compliance with the terms of

the contract and prudent management but which (i) normally are not carried on by the respective Secretary in his direct operation of the program or (ii) are provided by the Secretary in support of the contracted program from resources other than those under contract.

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SEC. 8. The provisions of any other laws to the contrary notwithstanding, any funds appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208), for any fiscal year which are not obligated and expended prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation and expenditures during such succeeding fiscal year. *In the event such funds ar obligated but not expended during such succeeding fiscal year they may be expended during the next succeeding fiscal year. If the funds are to be expended in the succeeding fiscal years for the propose for which they were originally appropriated, contracted or granted, no additional justification or documentation of such purposes need be provided by the tribal organization to the agency as a condition of receiving and expending such funds. At least 80% of such funds, as determined by the agency and the contractor or grantee, shall be made available on the first day of the succeeding fiscal year.*

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SEC. 102. (a) The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of such Indian tribe to plan, conduct, and administer programs *including construction programs,* or portions thereof provided in the Act of April 16, 1934 (48 Stat. 596), as amended by this Act, any other program or portion thereof which the Secretary of the Interior is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto *including (i) any program or portion thereof, including construction program, administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of the Interior, and (ii) any program, or portion thereof, for the benefit of Indians without regard to the agency or office of the Department of the Interior within which it is performed*: Provided, however, That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: Provided further, That in arriving at his finding, the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained

personnel, or (F) other necessary components of contract performance.

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SEC. 103. (a) The Secretary of Health, Education, and Welfare (Secretary of Health and Human Services) is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of such Indian tribe to carry out all of his functions, authorities, and responsibilities under the Act of August 5, 1954 (68 Stat. 674), as amended, *or any program, or portion thereof, which the Secretary is authorized to administer for the benefit of Indians including (i) any such program, or portion thereof for which appropriations are made to agencies other than the Department of Health and Human Services and (ii) any such program, or portion thereof, without regard to the agency, or office within which it is performed within the Department of Health and Human Services: Provided, however,* That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted for will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: Provided further, That the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services], in arriving at his finding, shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.

(b) Whenever the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] declines to enter into a contract or contracts pursuant to subsection (a) of this section, he shall (1) state his objections in writing to the tribe within sixty days; (2) provide, to the extent practicable, assistance to the tribe or tribal organization to overcome his stated objections; and (3) provide the tribe with a hearing, under such rules and regulations as he shall promulgate, and the opportunity for appeal on the objections raised.

[(c) The Secretary of Health, Education, and Welfare is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this title to obtain adequate liability insurance: Provided, however, That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's soverign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance.]

(c) Notwithstanding the provisions of section 2671, title 28, any tribal organization which has entered into a contract, grant or cooperative agreement with the Secretary of Health and Human Services

shall be treated as an agency within the Department of Health and Human Services for purposes of the Federal Tort Claims Act with respect to any tort arising out of its performance of such contract, grant or cooperative agreement. For purposes of this subsection and the Federal Torts Claim Act, the Secretary of Health and Human Services is designated at the head of the agency within the meaning of section 2672, title 28.

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SEC. 105. (e) Notwithstanding any other law, executive order, or administrative regulation, an enployee, serving under an appointment not limited to one year or less who leaves Federal employment to be employed by a tribal organization [on or before December 31, 1985,] in connection with governmental or other activities which are or have been performed by employees in or for Indian communities is entitled, if the employee and the tribal organization so elect, to the following:

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SEC. 106. (a) APPLICABILITY OF FEDERAL CONTRACTING LAWS AND REGULATIONS; WAIVER OF REQUIREMENTS.—Contracts with tribal organization pursuant to sections 102 and 103 of this Act [25 USCS §§ 450f, 450g] shall be in accordance with all Federal contracting laws and regulations expect that, in the discretion of the appropriate Secretary, such contracts may be negotiated without advertising and need not conform with the provisions of the Act of August 24, 1935 (49 Stat. 793), as amended [40 USCS §§ 270a et seq.]: Provided, That the appropriate Secretary may waive any provisions of such contracting laws or regulations which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act[.]*: Provided, further, That any request by an Indian tribe or tribal organization for a waiver of such laws or regulations or other regulations of the appropriate Secretary shall be granted unless declined in accordance with the criteria provided in section 102 or 103 of this Act and under the procedures established by regulations for the declination of tribal requests under such sections.*

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(e) In connection with any contract or grant made pursuant to section 102, 103, or 104 of this Act [25 USCS §§ 450f-450h], the apropriate secretary may permit a tribal organization to utilize, in carrying out such contract of grant, existing school buildings, hospitals and other facilities and all equipment therein or appertaining thereto and other personal property owened by the Government within his jurisdiction under such terms and conditions as may be agree upon for their use and maintenance*: Provided, That at his discretion, the appropriate Secretary may transfer the title to the Indian tribes to any personal property found to be in excess to the need of the Bureau of Indian Affairs or Indian Health Service.*

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[(h) MINIMUM AMOUNT OF CONTRACTS.—The amount of funds provided under the terms of contracts entered into pursuant to sections 102 and 103 [25 USCS §§ 450f, 450g] shall not be less than the appropriate Secretary would have otherwise provided for this direct operation of the programs, or portions thereof for the period

covered by the contract: Provided, That any savings in operation under such contracts shall be utilized to provide additional [additional] services or benefits under the contract.]

(h)(1) The amount of funds provided under the terms of contracts entered pursuant to this Act shall be no less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portion thereof for the period covered by the contract: Provided, That—

(i) for other than school or education programs, to such amount shall be added contract support costs which shall be negotiated with each contractor annually and which shall include costs attributable to all non-school or non-education programs for which the tribal organization has contracted pursuant to section 102 and 103 of this Act, and (ii) for school and education programs, the Secretary of the Interior shall adopt regulations establishing a formula for determining the amount of administrative overhead costs necessary to sustain the administration of such programs. This formula shall among others, include such factors as school enrollment, education program scope, organizational and administrative plans, support services plan, size of facilities, size or area within the school's service area boundaries, isolation, unique regional costs, presence of non-educational programs, personnel training plan, and the allowable indirect costs standards. Funds for administrative overhead costs allocated by this formula shall be promptly added to each contract.

(2) Once contract obligations are negotiated, the contract amount may be increased or decreased only with the consent of the contractor to reflect an increase or decrease in the level of appropriations.

(3) Any savings in operation or administration of such contract shall be utilized to provide additional services or benefits under the contract and may be carried over to the succeeding fiscal year without any reduction in the funding to which the contractor is otherwise entitled. Grounds for declining to carry over such saving shall be limited to those grounds specified in sections 102 and 103 of the Act.

(4) At the request of any Indian tribe, the appropriate Secretary shall disclose the most current amount of funding planned, obligated and expended for any program, or portion thereof, administered for the benefit of such tribe down to the fourth level of each agency's accounting system.

(5) The appropriate Secretary shall include in annual budget requests to the Congress a request for the funds necessary to provide contract support costs for all contracts anticipated in the fiscal period covered by the request and shall provide a supplemental report to the Congress on or before June 15th of each year identifying any deficiency of funds requested below estimated needs.

(i) The appropriate Secretary shall insure the responsive and efficient consideration of tribal requests under section 102, 103 and 104 of the Act by designating an official within the Bureau of Indian Affairs or the Indian Health Service, as appropriate, to supervise the review of applications and the negotiation, award and monitoring of contracts, grants or cooperative agreements by the appropriate agency. These two officials shall be

charged with the duty to further the purposes of this Act. The appropriate Secretary shall also delegate to such official the authority to review, at the request of the contractors, decisions to decline such contract, grant or cooperative agreement applications subject to the right of any applicant to an appeal and hearing as provided in this Act.

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SEC. 111. (a) The appropriate Secretary shall designated officials who are not employed by the Bureau of Indian Affairs or the Indian Health Service for the purpose of conducting hearings in declination appeals.

(b) Appeals and hearings on any declination to contract based on insufficient funding shall be conducted under the same procedures as apply in the case of other declinations.

(c) The appropriate agency shall give notice of any disallowance of costs within 365 days of receiving any required audit report and shall provide for an appeal and hearing to the appropriate officials on any such disallowance. Any right of action or other remedy relating to any such disallowance shall be barred unless notice has been given within the designated period.

SEC. 112. All contracts, grants and cooperative agreements entered into or issued pursuant to this Act shall be subject to the Contract Dispute Act of 1978, P.L. 95-563.

SEC. 113. Whenever an indirect cost rate is negotiated annually between a tribe or tribal organization and the cognizant federal agency, that rate shall be applicable to all contracts and grants made with such tribe or tribal organization pursuant to section 102, 103 and 104 of this Act. If not otherwise specifically prohibited by any other provisions of law, such rate shall be applicable to any other federal program administered by such tribe or tribal organization, and each federal agency responsible for such program shall apply such negotiated indirect cost rate and pay the full indirect costs incurred by the tribe or tribal organization in connection with the administration of such program. Whenever, in any fiscal year, a tribe or tribal organization does not receive full payment of its indirect costs from any federal, state or other entity funding a program, such lack of full payment shall not be considered in determining the Federal indirect cost rate for the subsequent fiscal years.

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